No. 227.

Brief of Gardiner for D. E.

Filed April 21, 1898.

In the Supreme Court of the United States.

October Term, 1897.

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HENRY J. HAVNOR,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

ASA BIRD GARDINER,
DISTRICT ATTORNEY.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

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HENRY J. HAVNOR, Plaintiff in Error, vs. THE PEOPLE OF THE STATE OF NEW YORK.	In error to the Supreme Court of the State of New York.

Brief for the Defendant in Error.

The plaintiff in error was convicted in the Court of Special Sessions of the City and County of New York, on the 4th day of November, 1895, of violating the provisions of the New York statute known as Chapter 823 of the Laws of 1895, entitled "An Act to Regulate Barbering on Sunday," which makes it a misdemeanor to carry on or engage in the business of shaving, hair-cutting or other work of a barber on the first day of the week, except in the city of New York and in the village of Saratoga Springs, in that state, where such work may be performed until one o'clock in the afternoon of such day (Record, pp. 2, 17).

It was proven by the evidence, and admitted on the trial, that on the 9th day of June, 1895, after one o'clock in the afternoon, at the barber shop kept by the defendant, at No. 57 West Thirty-third street, in the city of New York, the plaintiff in error's employes, in his presence, and by and with his consent and procurement, after the hour mentioned in the statute, carried on and engaged in the work of barbers in his shop (pp. 10-15), and the only question there presented was whether the statute upon which the prosecution was based is a constitutional enactment (pp. 15-16), counsel for the plaintiff in error assailing its validity solely on the ground "that it appears from the testimony that barbering on Sunday is a work of necessity," and that therefore, "the act which prohibits barbering on Sunday under the decisions of the Court of Appeals of this state would be unconstitutional" (p. 15).

From the judgment rendered on the conviction the plaintiff in error appealed to the Supreme Court of the state of New York (p. 5). The judgment was affirmed by the Appellate Division of the Supreme Court on the 7th day of February, 1896 (pp. 19-20), and the plaintiff in error then appealed to the Court of Appeals.

There it was argued:

(1.) That the act is void under Article 1 of the constitution of the state of New York, which provides that "No person shall be deprived of life, liberty or property without due process of law."

(2.) That it is void, not only under this clause of the state constitution, but under the rights guaranteed by the Vth and XIVth amendments to the constitution of the United States to the citizens of the several states, and

(3.) That it is void as an unwarrantable exercise of the police power of the state, operating to the in-

jury of the defendant in his business, without any tendency to promote the good order, health and comfort of the community, but, on the contrary, contributing directly to its discomfort and inconvenience (pp. 28-36).

On the 14th day of April, 1896, the Court of Appeals affirmed the judgment of the Appellate Division, and remitted the proceedings to the Supreme Court (pp. 42-43).

Error in the proceedings below is assigned by a general allegation to the effect that the New York Court of Appeals and Supreme Court erred in overruling the plaintiff in error's contention—

> " that the said conviction was illegal because the same was violative of the Fourteenth Amendment of the constitution of the United States, providing that ' no person shall be deprived of life, liberty or property without due process of law,' and of the corresponding clause in the constitution of the state of New York " (pp. 51-52).

First.—The statute is a valid exercise of the police power of the state.

(*a*.) The police power extends to the protection of persons and property within the state. In order to secure that protection either may be subjected to restraints and burdens by legislative acts. The individual must sacrifice his particular interest or desires, if the sacrifice is a necessary one, in order that organized society as a whole shall be benefited. Restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated.

If the legislation is calculated, intended, conve-

nient or appropriate to accomplish the good of protecting the public health or of serving the public comfort and safety, the exercise of the legislative discretion is not the subject of judicial review.

> "The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control; and in the exercise of such power the legislature is vested with a large discretion, which if exercised *bona fide*, for the protection of the public, is beyond the reach of judicial inquiry."
>
> Louisville & Nashville Ry. *vs.* Kentucky, 161 U. S., 677 (at p. 700).

(*b.*) The statute under consideration is calculated, intended and appropriate to accomplish a public good.

Its object, as shown by its title and context, is to regulate a particular trade. It does not require the observance of the Sabbath as a religious institution. There is nothing in it to prevent barbers from carrying on their trade in any manner or in any place they see fit. They are simply required to abstain from prosecuting their trade on one day during each week, namely, on Sunday, excepting in certain specified places, where they are permitted to prosecute it even on that day during certain specified hours.

(*c.*) The peculiar character of the first day of the week as a day of rest and recreation has been recognized from time immemorial by legislatures and courts. Statutes requiring the cessation of all secular occupations on Sunday, passed in colonial times as well as under the various constitutions in force since the organization of the union, have uniformly been enforced in the state of New York.

29 Car. II., Chap. 7.
2 Green, 89.
Andrews, 467.

1 R. L., 194.
2 R. S., 675, Sect. 70.
Laws of 1788, Chap. 42.
Laws of 1801, Chap. 34.
Laws of 1847, Chap. 349.
Laws of 1883, Chap. 358.
Penal Code, §§ 259-270.

Similar laws in other states, requiring the closing of places of business on Sunday have generally been sustained.

People *vs.* Bellet, 99 Mich., 151.
Vogelsong *vs.* State, 9 Ind., 112.
Ungericht *vs.* State, 119 Ind., 379.
Shover *vs.* State, 10 Ark., 259.
State *vs.* Frederick, 45 Ark., 347.
Warner *vs.* Smith, 8 Conn., 14.
Bloom *vs.* Richards, 2 Ohio St., 387.
Specht *vs.* Commonwealth, 8 Pa. St., 312.
Commonwealth *vs.* Waldman, 140 Pa. St., 89.
Commonwealth *vs.* Jacobus, 1 Pa. Leg. Gaz., 491; 15 Central Law Journal, 145.
Commonwealth *vs.* Williams, 1 Pearson (Pa.), 61.
Commonwealth *vs.* Has, 122 Mass., 40.
Commonwealth *vs.* Dextra, 143 Mass., 28.
Bohl *vs.* State, 3 Tex. App., 683.
Phillips *vs.* Innes, 4 C. & F., 234; 2 Rob. Prac., 400.

See also—

Cooley's Const. Lim. (5th Ed.), 589, 726.
Tiedman's Lim. Police Power, 183.
Hare's Amer. Const. Law, 766.

(*d.*) While questions have arisen as to the right of the state to prohibit noiseless and inoffensive

occupations on Sunday, when such occupations can be carried on by one individual without the assistance of others, and as to the right to prohibit persons who habitually observe some other day for rest and recreation, from pursuing their usual occupations on Sunday, it may safely be asserted as a general proposition that all persons may be required by the sovereign power to suspend their ordinary business on Sunday, in order that thereby the physical and moral well-being of the public may be served. Inconvenience to some is not regarded as an argument against the constitutionality of statutes requiring such cessation of business, that being incident to all general laws. Accordingly, Sunday statutes having been sustained as constitutional, almost without exception, the most notable instance to the contrary,

Ex parte Newman, 9 Cal., 502,

which was decided by a divided Court, having been subsequently overruled.

Ex parte Andrews, 18 Cal., 685.
Ex parte Koser, 60 Cal., 202.

The leading New York case upon the subject is that of Lindenmuller *vs.* People, 33 Barb., 548, in which it was held that the state constitution recognizes Sunday as a day of rest; that it exists as such by the common law, and needs no legislation to establish it; and that the state may regulate its observance as a civil and political institution.

That case was expressly approved in Neuendorff *vs.* Duryea, 69 N. Y., 577, 561, 563, where it was referred to as a decision—

> "which has never been questioned in a court of higher or equal authority."

It was also cited with approval in People *vs.* Moses, 140 N. Y., 214, 215, where Judge Earl, delivering the prevailing opinion of the Court of Appeals said:

> "According to the common judgment of civilized men, public economy requires for sanitary reasons a day for general rest from labor, and the day naturally selected is that regarded as sacred by the greater number of citizens, as this causes the least inconvenience through interference with business."

(*e.*) It is to the interest of the state that its citizens should be robust, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose by protecting the citizen from overwork and assuring him an opportunity for necessary rest and recreation have a manifest tendency to benefit the public welfare. Wholly aside from any questions of morals or religion, the physical welfare of the citizen is so directly connected with, and of such primary importance to the state as to render laws, calculated to promote that object, well within the police power.

(*f.*) The statute under discussion manifestly tends to accomplish this result by requiring persons engaged in a class of trade that requires manual labor to refrain from such labor one day in seven. An opportunity is thus afforded for necessary rest both to the employer and employed, an opportunity which the latter, at least, might not be able to enjoy without the aid of legislation.

(*g.*) It cannot be said that the manifest beneficial public purposes and results before mentioned are not commensurate with the public discomfort and inconvenience consequent upon the enforcement of the statute.

The public health, comfort, or reasonable convenience does not require the keeping open of barber shops on Sunday, and there is no public "necessity" for their operation on that day in the proper sense of the word.

A work of necessity, in a legal sense, means a work upon the doing of which depends the public

health, comfort or decency, or which, by reason of peculiar circumstances, is imperative in a particular case.

1. The courts of several states have decided that the business of a barber in shaving his customers on Sunday is not a work of necessity.

Com. *vs.* Jacobus, 1 Pa. Leg. Gaz. Rep., 491; 15 Cent. L. Jour., 145.
Com. *vs.* Williams, 1 Pearson (Pa.), 61.
Com. *vs.* Waldman, 140 Pa. St., 89.
Com. *vs.* Dextra, 143 Mass., 28.
Ungericht *vs.* State, 119 Ind., 379.
State *vs.* Frederick, 45 Ark., 347; 55 Am. Rep., 555.

A different view was taken at one time in Tennessee,

State *vs.* Torry, 7 Baxt., 95,

but subsequently the legislature of that state passed an act, as to the constitutionality of which no question appears to have ever been raised, requiring the closing of all barber shops on Sunday.

2. That the work of a barber on Sunday is not a work of public "necessity" is a matter of common knowledge, and of which judicial notice will therefore be taken.

3. The evidence given by the plaintiff in error on the trial of the case at bar fairly presents the only possible grounds upon which such a contention could be made. He testified that he had customers who could not shave themselves, customers whose business kept them up late Saturday nights, and who required shaving on Sundays, and customers who rose as late as 1 or 2 o'clock on Sundays, and that it was necessary to shave all or some of these particular persons on Sunday afternoons, because their beards grew so fast every day that it was a matter of cleanliness to have them shaved (pp. 11–14).

This testimony simply showed that in these particular instances it was convenient for the individuals referred to that they should be shaved Sunday afternoons.

It may be suggested that, though these persons' comfort, or even their cleanliness, required, because of their inability to shave themselves or to repair to the defendant's shop before 1 o'clock, that they should go there and be shaved on Sunday afternoon, there was nothing in the evidence to show that the defendant had any reason to suppose that the general male public, or all his Sunday afternoon customers, including Officer McGovern, were men of similar temperament, or that he kept his shop open after 1 o'clock solely for the purpose of accommodating persons of that character.

Second.—The statute, instead of restricting the plaintiff in error's liberty of action in the conduct of his trade, in fact relieved him of an existing restriction.

Prior to the passage of the act of 1895 *all labor on Sunday was prohibited* in the state of New York, excepting works of necessity or charity, under a penalty of not less than five or more than ten dollars, or imprisonment for not exceeding five days, or both, for a first offense, and for a subsequent offense by a fine of not less than ten nor more than twenty dollars, and imprisonment for not less than five nor more than twenty days,

Penal Code, Sects. 263, 269.

In "works of necessity or charity" was included "whatever is needful during the day for the good order, health or comfort of the community."

Ibid., § 263.

The business of "barbering" on Sunday not being, as we have above shown, needful for the public good order, health or comfort, was therefore wholly prohibited.

The Act of 1895 not only removed this absolute prohibition, so far as it affected barbers following their trade in the localities therein specified, of which the plaintiff in error was one, but expressly authorized them to keep their shops open and perform their work therein "until one o'clock of the afternoon of the first day of the week."

It moreover reduced the penalty for a first offense to a fine of not more than five dollars.

Chap. 823, Laws of 1895.

It is therefore difficult to understand how the plaintiff in error can properly claim to have suffered any injury by the passage of the statute.

Third.—The exercise of the police power of the State does not deprive anybody of life, liberty or property within the meaning of the Fourteenth Amendment.

Barbier *vs.* Connelly, 113 U. S., 27.
Powell *vs.* Pennsylvania, 127 U. S., 678, 683.
In re Rahrer, 140 U. S., 545.
Giozza *vs.* Tiernan, 148 U. S., 657.
N. Y. & N. E. R. R. Co. *vs.* Bristol, 151 U. S., 556.

Fourth.—The statute cannot be said to be class legislation within the prohibition of the Fourteenth Amendment.

(*a.*) A statute which is carrying out a legitimate public purpose is limited in its application to certain defined localities, but, within the territory to which

it applies, affects alike all persons similarly situated, is not within the prohibition.

The general objects and purposes of the Fourteenth Amendment—

> " are to extend United States citizenship to all natives and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made."
>
> Missouri *vs.* Lewis, 101 U. S., 22, 30.

The amendment simply means—

> " that no persons or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."
>
> Missouri *vs.* Lewis, (*supra*).

Legislation which, in carrying out a public purpose, is limited in its application, but within the sphere of its operation affects alike all persons similarly situated, is not within the amendment

Barbier *vs.* Connelly, 113 U. S., 27.

It—

> "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstauces and conditions, both in the privileges conferred and in the liabilities imposed."
>
> Hayes *vs.* Missouri, 120 U. S., 68.

The statute here under discussion treats all barbers alike within the same localities. None can work on Sunday, outside of New York and Saratoga Springs, but all may work in these places until one o'clock in the afternoon. All are, therefore, treated alike, under similar conditions, both in the privileges conferred and the liabilities imposed."

(*b.*) It is not for the plaintiff in error to urge that the act unjustly discriminates in his favor by according him a privilege denied to barbers elsewhere in the state.

Conclusion.—The judgment below should be affirmed.

ASA BIRD GARDINER,
District Attorney.